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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 427

JOHN T. BARKER,

Appellant,

vs.

C. LAWRENCE LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

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STATUTES CITED

Constitution of the United States:

Article I, Section 10 2
14th Amendment 2

Revised Statutes of Missouri, 1929:

Section 5678 4
Section 5874 4

Revised Statutes of Missouri, 1949, Section 379.375

United States Code, Title 28:

Section 1253 2
Section 2101 2
Section 2281 2
Section 2284 2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

Civil No. 422

JOHN T. BARKER,

Plaintiff,

vs.

C. LAWRENCE LEGGETT, Superintendent of the Insurance Department of the State of Missouri; MOUNT ETNA MORRIS, Treasurer of the State of Missouri and as a Member of the Board of Fund Commissioners; W. H. HOLMES, Auditor of the State of Missouri and as a Member of the Board of Fund Commissioners of the State of Missouri; G. H. BATES, Director of Revenue of the State of Missouri and as Secretary of the Board of Fund Commissioners of the State of Missouri; FORREST SMITH, a Member of the Board of Fund Commissioners of the State of Missouri; and J. E. TAYLOR, a Member of the Board of Fund Commissioners of the State of Missouri,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the district court entered in this case.

Opinion Below

The opinion of the District Court for the Western District of Missouri, Central Division (sitting as a Three Judge Court pursuant to the provisions of Title 28 U.S.C. Sections 2281 and 2284) is not reported but is attached hereto as Appendix A.

Jurisdiction

The order of the District Court (sitting as a Three Judge Court pursuant to the provisions of Title 28 U.S.C. 2281 and 2284) denying plaintiff's application for a temporary injunction against defendants as state officers to enjoin the enforcement of a state statute (Section 379.395 R.S. Mo., 1949) as being unconstitutional and void because in violation of Article 1, Section 10, Paragraph 1, and the Fourteenth Amendment to the Constitution of the United States, and the final judgment and decree of said Three Judge Court dismissing plaintiff's complaint herein on the ground it failed to state a claim against defendants on which relief could be granted, both were entered on September 5, 1951. A petition for appeal is presented to the district court herewith, to-wit, on October 4, 1951. The jurisdiction of the Supreme Court to review his decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b), also by Rules 36 and 47 of the Supreme Court of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. Ct. 725; *Natural Gas Pipeline Co. of America* v. *Slattery*, 302 U. S. 300, 58 S. Ct. 199; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 70 S. Ct. 851; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204, 59 S. Ct. 480;

Railroad Commission of California v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 58 S. Ct. 334; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187.

Questions Presented

Where the State of Missouri has employed plaintiff as a lawyer to bring a suit to recover a fund for policyholders of fire insurance companies by a written contract providing plaintiff is to be paid a reasonable fee for his services and be reimbursed for his expenses out of said fund contingent on recovery; Plaintiff performed such services resulting in the recovery of a fund of $2,751,000.00. After all policyholders had been paid there remained a fund of $2,100,000.00; the Missouri Supreme Court held plaintiff had a valid contract but could not be paid out of said fund as it was a trust fund for the policyholders; thereafter the General Assembly of Missouri passed an act (Section 379.395 R. S. Mo., 1949) escheating said fund to the State of Missouri without any provision for payment to plaintiff or providing him any judicial remedy for the recovery of his fees and expenses; large amounts out of said fund were paid to others similarly employed; did the Three Judge District Court err and abuse its judicial discretion in denying plaintiff's application for a temporary injunction and in dismissing plaintiff's complaint and rendering a final judgment against plaintiff holding there was no substantial constitutional question presented as to the impairment of plaintiff's right to contract, impairment of the obligation of his contract, denial of due process of law, or denial of equal protection of the law by state action through its highest court, its legislature and its Governor, Treasurer, Auditor, Attorney General, Superintendent of Insurance and Director of Revenue acting as members of the Board of Fund Commissioners of the State of Missouri.

Statutes Involved

Title 28 U.S.C. Sections 1253, 2101(b), 2281, 2284; Article 1, Section 10, Par. 1, and the Fourteenth Amendment to the Constitution of the United States; and Section 379.375 R. S. Mo., 1949, which latter statute is set forth in Appendix B hereto. Section 5678 R. S. Mo. 1929, set forth in Appendix C; Section 5874 R. S. Missouri 1929, Appendix D.

Statement

On October 9, 1922, the Missouri Superintendent of Insurance entered an order directing a ten per cent reduction in the premium rates on fire, lightning and windstorm insurance. Over One Hundred Fifty such companies refused to recognize the validity of such order and litigated the issue from said time until August, 1929. *Aetna Insurance Company* v. *Hyde*, 315 Mo. 115, 285 S. W. 65; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 48 S. Ct. 174, 72 L. Ed. 837.

During the time intervening the said Companies continued to collect premiums at the old and unreduced rates.

At the conclusion of such litigation the insurance companies began refunding to policyholders but it became apparent they would not do a good job. In June, 1930, the Governor of Missouri (a lawyer) the Attorney General of Missouri, and the Missouri Superintendent of Insurance employed plaintiff to bring a suit against said companies for restitution of the excess premiums collected during the period of litigation.

The contract was in writing and provided that if plaintiff and his associates were successful in recapturing all or any part of the undistributed residue of the excess premiums collected in violation of said premium rate reduction order they were to be paid from the recaptured funds for their

services a reasonable contingent fee out of such funds. The contract was made for the benefit of the policyholders who paid such excess premiums.

In reliance upon said agreement and contract plaintiff and his associates entered upon the performance of their duties under said contract and as a result of litigation instituted and maintained by them restitution of $2,751,000.00 was obtained. After the Insurance Department had refunded to all policyholders who could be found there remained in said fund a balance of $2,100,000.00.

The Insurance Department of Missouri refused to pay plaintiff and his associates out of said fund; Litigation followed; *Aetna Insurance Company* v. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164; *State ex rel. Lucas* v. *Blair*, 348 Mo. 900, 156 S. W. 2d 634; *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S. W. 2d 742. The substance of the rulings in such cases was that the general equity principles and terms of plaintiff's contract authorizing the payment of his fees out of said fund and giving him a lien on said fund was superseded by the Missouri Insurance Code in effect when he was employed directing that the fund be "turned over to the policyholders pro-rata", and that as a consequence of such statute plaintiff's otherwise valid contract was invalid as to that part authorizing payment of his fees out of said fund and advising that; "the question of respondent's reimbursement may be addressed to the General Assembly." (215 S. W. 2d, l. c. 743; 156 S. W. 2d l. c. 638.)

In 1941 the General Assembly of Missouri passed the Escheat Act here involved (Section 379.395, R.S. Mo., 1949) providing that within five years after such fund was paid into the state treasury "any person or corporation who appears and claims the same may file his petition in the Circuit Court of Cole County, Missouri, etc.". In the case of *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S.W. 2d 742, the Supreme Court of Missouri held that the above provision

was limited to policyholders and gave plaintiff and his associates no remedy but "your claims must be presented to the legislature for consideration." (215 S.W. 2d 1, c. 745). Three applications to the legislature by plaintiff for relief were unsuccessful.

On August 9, 1946, The Missouri Superintendent of Insurance made a finding that all policyholders had been paid who could be found and paid the balance of $2,100,000.00 into the State Treasury to be held as a separate fund for five years and until August 9, 1951.

The State of Missouri paid plaintiff's associate Weatherby the sum of $42,500.00 out of this fund and paid Cook and Lauf for legal services in such litigation out of said fund an amount in excess of $100,000.00 and all expenses; that suits were brought against said parties to recover said payments but were dismissed and said parties permitted to retain such payments upon releasing any further claim for fees for such services. Plaintiff was paid nothing on his fee and nothing by way of reimbursement for his expenses in such litigation.

Plaintiff instituted this suit against the defendants as state officers and members of the state fund commission having custody and control of said fund and sought a temporary restraining order against defendants transferring such funds to the general revenue of the State of Missouri as defendants proposed to do on October 9, 1951. The District Court denied such restraining order and such funds were thereafter transferred to the general revenue fund of the State of Missouri on or about August 9, 1951.

A Three Judge Court was assembled and on September 5, 1951, after a hearing and trial such Court denied plaintiff's application for a temporary injunction, dismissed plaintiff's complaint on the ground that it failed to state a claim on which relief could be granted and entered final judgment against plaintiff. The Court filed a written memorandum

order denying preliminary interlocutory injunction and dismissing action which it attached hereto as Appendix A.

The Questions Are Substantial

In the case of *Bell* v. *Hood*, 327 U. S. 678, 684, 66 S. Ct. 773, the Court stated the policy of the Federal courts as follows (l. c. 777):

> "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."

The memorandum order of the Three Judge Court correctly notes that the State Court decisions establish beyond question that plaintiff has no remedy in the State Courts of Missouri. *Aetna Insurance Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W. 2d 1164; *Lucas* v. *Lamb*, 348 Mo. 900, 156 S.W. 2d 634; *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S.W. 2d 742.

In the last case cited the Court said (215 S.W. 2d l c. 744):

> "We must again, as we have before, say to these plaintiffs, your claims must be presented to the legislature for consideration."

The Missouri legislature is a purely political body, exercises no judicial functions and is immune to judicial process and suit. Sending plaintiff to the legislature is clearly a denial of due process in violation of the Fourteenth Amendment. Whenever the right to enforce a contract "by legal process is taken away or materially lessened" the obligation of the contract is taken away or materially lessened within the meaning of Article 1, Section 10, Par. 1. *Lynch*

v. *United States*, 292 U. S. 571, 580, 54 S. Ct. 840; *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 54 S. Ct. 816; *Edwards* v. *Kearzey*, 96 U. S. 595.

Plaintiff was entitled to the independent consideration of the issues as to the violation of his rights under the constitution of the U. S. at the hands of the Three Judge District Court. Instead of giving him that right they refused to consider such issues and held they were completely and absolutely bound by the State Court decisions. In so ruling said Court deprived plaintiff of substantial federal rights.

In *Larson* v. *South Dakota*, 278 U. S. 429, 433, 49 S. Ct. 196, it is stated (l. c. 197):

> "The petitioner relies on the contract clause of the federal constitution, and is not prevented from invoking from this court an independent consideration of what the contract means, and whether by a proper construction, the building of a bridge impairs its obligation."

In the recent case of *Niemotko* v. *State of Maryland*, 71 S. Ct. 325, this Court said (l. c. 327):

> "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded. See *Feiner* v. *New York*, 340 U. S. —, 71 S. Ct. 303."

See to like effect *Coombes* v. *Getz*, 285 U.S. 434, 436, 52 S. Ct. 435, 436; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561, 562, 62 S. Ct. 398, 401; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659, 65 S. Ct. 870, 874; *United States Mortgage Co.* v. *Matthews*, 293 U. S. 232, 236, 55 S. Ct. 168, 170.

The Missouri Insurance Code made no provision for the undistributable surplus after all policyholders had been paid. When that point was reached the insurance code

ceased to have any effect and the general rule that in equity one whose efforts produced a fund had a lien on such fund for compensation for his services would have come into full play here if the escheat law (Section 379.395 R.S. Mo., 1949) had not intervened. The Missouri Supreme Court held that statute cut off plaintiff's right to be paid out of this fund and denied him a court remedy on his contract. *Weatherby v. Jackson*, 358 Mo. 542, 215 S.W. 2d 742.

This constituted a clear impairment of the obligation of plaintiff's contract in violation of Article 1, Section 10, Par. 1 of the Constitution of the United States.

This escheat statute was not passed by the state in the exercise of its police power "to safeguard the vital interests of its people" in matters like public safety and health and may not be classified under any such exceptions to the general provisions of such constitutional provision.

The destruction of this attorney's right to be paid in accordance with the clear provision of a valid contract, or the destruction of his equitable right to a lien impressed upon the unreturnable residue of this fund for a reasonable fee to be fixed by the court by legislation not in the valid exercise of the state's police power to protect some vital interest of the public, has deprived him of his property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Lynch v. United States*, 292 U. S. 571, 54 S. Ct. 840.

Prior to the passage of such escheat statute no Missouri court decision held that the pro rata provision of Section 5874 R.S. Mo. 1929 (appearing as Appendix D hereto) applied to the unreturnable or undistributable residue or surplus after all policyholders had been paid. It was by force of this statute that the Missouri Supreme Court has held that plaintiff may not be paid out of such undistributable residue.

The right of plaintiff to be paid for his services out of

such fund is an equitable right and a contract right and is to be regarded as "property" within the meaning of the term as used in the due process clause of the Fourteenth Amendment Clause to the Constitution of the United States and the escheat act taking from plaintiff such right is in violation of such constitutional provision. *Lynch* v. *United States*, 292 U. S. 571, 54 S. Ct. 840.

The State of Missouri paid plaintiff's associate Weatherby as attorney's fees for services in assisting in collecting this fund the sum of $40,000.00 and allowed Cook and Lauf in excess of $100,000.00 for legal services in connection with such litigation, all of which was paid out of this fund. The State of Missouri later sued each of said parties for the recovery of the amount paid and then dismissed such suits and permitted said parties to retain the amounts paid to them upon their releasing the State from any further claim for services. Plaintiff was never paid a cent by way of fees for services in this litigation or reimbursement for expenses advanced by him. This clearly constitutes a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. This constitutional provision has always been construed to require equal treatment to persons under similar circumstances and to invalidate such discrimination as here involved, whether such discrimination be brought about by action of a legislature, *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U. S. 515, 49 S. Ct. 235; *Louisville Gas and Electric Co.* v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423; *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 47 S. Ct. 678; by action of a court or judicial officer, *Shelley* v. *Kraemer*, 334 U. S. 1, 14-20, 68 S. Ct. 836, or by an executive or administrative officer, *McLaurin* v. *Oklahoma*, 339 U. S. 637, 70 S. Ct. 851; *State of Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337, 343, 59 S. Ct. 232, 234.

Therefore the escheat act, the decisions of the Supreme

Court of Missouri and the action of the attorney general and superintendent of insurance here involved come within the constitutional provisions as state action and are a violation of the constitutional guarantee.

It is submitted that the escheat statute destroyed vested contract and property rights of this plaintiff; that such statute and the court decisions of the Supreme Court of Missouri and the action of the defendants as state officers in refusing to pay plaintiff out of said fund even after all policyholders' rights have expired, raise such clear proof of the violation of substantial Federal rights in plaintiff as to make the action of the Three Judge Court in denying an interlocutory injunction and dismissing plaintiff's complaint and entering judgment against him an abuse of discretion and erroneous and in violation of his rights under Article 1, Section 10, Par. 1, and the Fourteenth Amendment of the Constitution of the United States entitling him to a review in this Court.

Respectfully submitted,

(S.) Walter A. Raymond,
(S.) William H. Becker,

Counsel for Plaintiff-Appellant.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

No. 422

JOHN T. BARKER, Plaintiff,

v.

C. LAWRENCE LEGGETT, Superintendent of the Insurance Department of the State of Missouri, et al., *Defendants*

MEMORANDUM ORDER DENYING PRELIMINARY INTERLOCUTORY INJUNCTION AND DISMISSING ACTION

On three occasions, the Supreme Court of the State of Missouri, construing statutes of that State, has ruled that plaintiff, his associates, and others who were claiming attorneys' fees and expenses to be a lien upon, and payable out of, the insurance restitution fund referred to in the complaint, had no lien thereon and were not entitled to be paid out of such fund.

In *Aetna Insurance Co. v. O'Malley* (1938), 124 S. W. (2d) 1164, that Court specifically rejected the claim of plaintiff that he was entitled to a lien on said fund for attorney's fees, on the ground that the general equity principles and terms of his contract of employment, which plaintiff there asserted entitled him to share in the fund, had been "superseded" by statute, in effect when he was employed, which directed that the fund be "turned over to the policyholders pro-rata," and that, as a consequence of said statute, that portion of plaintiff's contract of employment that provided for payment of attorney's fees from said fund was illegal.

Subsequent to the ruling so made, the Legislature of the State of Missouri enacted the escheat statute referred to in the complaint. *(Sec. 379.395, R. S., Mo. 1949.)* After enactment thereof, which provided that the residue of the

insurance restitution fund escheat to the State, after payment of claims, plaintiff again sought to have attorney's fees allowed and paid to him out of said fund, as a "claimant" under that statute. The Supreme Court of Missouri held, that said fund belonging to "policyholders" under the Insurance Code of Missouri *(Sec. 379.390, R. S., Mo., 1949)*, only policyholders were proper claimants thereunder, and denied the claim of plaintiff and his associates, so made. *Weatherby v. Jackson* (1948), 215 S. W. (2d) 742.

The gist of the instant action is that the escheat statute *(Escheat Act of 1941, Sec. 5985a, Laws of Missouri, 1941, page 397; now 379.395, R. S., Mo., 1949)* as enacted by the Legislature of Missouri, and as construed by the Supreme Court of that State in *Weatherby's case, supra*, violates plaintiff's contract and property rights under *Article 1, Sec. 10, par. 1, of the Federal Constitution*, and that he has also been denied rights under the equal protection clause of the *Fourteenth Amendment* thereto, all as more fully set forth in the complaint. The theory of recovery asserted by plaintiff is stated by him as follows:

> "During the time when it was undetermined whether all, or how much, of the fund could be returned to policyholders, this *pro-rata* provision of the statute as interpreted by the Missouri Supreme Court, prevented the carrying out of that part of the valid contract which called for payment of reasonable attorney's fees, as fixed by the Court, out of the fund. When it became clear that there would be a large sum returnable because policyholders with rightful claims thereto could not be found, then as to this undistributable residue, this obstacle to the carrying out of that part of the valid employment contract calling for payment of said reasonable attorney's fees * * * no longer existed. In like manner, the basis for denying application of the admitted equitable principles ceased to exist. At that point, the attorneys, parties to admittedly valid contracts calling for payment for reasonable attorneys' fees out of the fund, became entitled under that contract, to have their claims allowed out of this undis-

tributable residue to which no policyholders could be found with a valid claim."

(Plff.'s Brief on Motion to Dismiss, p. 8.)

The denial to plaintiff of the alleged right to have attorney's fees due and owing to him to be now paid out of the "undistributable portion of the insurance restitution fund," is the sole basis for the constitutional propositions here raised by him. That such contention does not present a substantial constitutional question that would authorize this Court to grant the relief here prayed, is manifest to us from the following considerations.

(a) The 1938 decision of the Supreme Court of Missouri *(124 S. W. (2d) 1161)* which held that that portion of his contract of employment by the Superintendent of the Insurance Department of the State of Missouri, providing that attorney's fees to be paid plaintiff should be fixed by the Court, and paid out of the fund, was illegal, in violation of a statute of the State; and, that any equitable right asserted by plaintiff, to be paid from the fund, was superseded by statute, is not, and cannot here be challenged by plaintiff. That decision is binding upon us.

(b) It is there also ruled that said fund belonged to policyholders and should be returned to them unimpaired by any claim of plaintiff and his associates.

(c) The enactment of the Escheat Statute, supra, did not fracture the title of the policyholders to the fund in question so found to be resident in them by the Supreme Court of Missouri, so as to make the State of Missouri a new direct beneficiary of the undistributable portion thereof, distinct from the policyholders.

(d) When the State takes property by escheat, the State's position is like that of an ultimate distributee, in default of other statutory distributees. *State v. Phoenix Sav. Bank & Tr. Co. (Ariz.)*, 132 P. (2d) 637, 639; *State v. Standard Oil Co. (N. J.)*, 74 A. (2d) 565, 572. Mr. Justice Cardozo once said: "The state as the ultimate owner is in effect the ultimate heir." *In re Melrose Ave. (N. Y.)*, 136 N. E. 235, 236. The United States Supreme Court has distinctly held that the right of escheat is a right of suc-

cession, rather than an independent claim to the property escheated. *Christianson v. King County*, 239 U. S. 356, 370. The result of that is this: "The State's right is purely derivative; it takes only the interest of the unknown or absentee owner." (*Standard Oil case, supra*, 74 A. (2d) 565, 573.) Consequently, that which escheats to the State of Missouri under the statute here challenged by plaintiff is the title of policyholders to the fund in question, and not an independent taking or vesting of the fund in the State, so as to make the undistributable portion of the fund one directly recovered by plaintiff for the State, under his contract of employment, as plaintiff now contends.

(e) When the fund escheats to the State, the State "is thereby invested with all the rights, privileges, priorities, and appurtenances incident thereto and with which it was held by the persons from whom it escheated." *19 Am. Jur., p. 409.* The fund being held for policyholders, free and clear of any lien in favor of plaintiff and his associates, the escheat thereof to the State did not create any right in plaintiff to now claim that he recovered such fund for and on behalf of the State within the ambit of his contract of employment, or any equitable principle here asserted by him. The priority of the policyholders to said fund passed to the State, unqualified and undiminished by any right that plaintiff now asserts against the fund in suit.

(f) The contention of plaintiff that he is being denied the equal protection of the law, because the State has not compelled Lauf, Cook and Weatherby to repay to the fund the various sums paid to them, but, on the contrary, has compromised litigation instituted by the State looking to that result, is without merit. In Weatherby's case, supra, and in *Aetna Ins. Co. v. O'Malley*, 118 S. W. (2d) 3, the payments so made from the fund to said parties were held to be illegal under State law by the Supreme Court of Missouri. The refusal of the State to countenance further illegal payments to be made from the fund in question cannot be held a denial of equal protection of the law. *Meyer v. Terr. of Hawaii*, 164 F. (2d) 845, 849.

Plaintiff's motion for a preliminary injunction is by the Court denied.

Defendant's motion to dismiss this action is by the Court sustained.

(Signed) J. C. Collet,
Judge, United States Court of Appeals, Eighth Circuit;

(Signed) R. M. Duncan,
Judge, United States District Court;

(Signed) Albert A. Ridge,
Judge, United States District Court.

(Stamped, Filed Sept. 5, 1951.)

APPENDIX "B"

379.395. Unclaimed Money Shall Escheat—Procedure

1. The superintendent of insurance, after the final determination of any action to review his orders and directions as provided in section 379.390, shall immediately use all proper diligence to return to the persons or companies entitled thereto, all funds held by him during the pendency of such action or review.

2. If, after said superintendent of insurance has diligently used such methods and means as he shall consider reasonable to refund said funds, there shall remain in his hands any money, the owner of which being unknown to said superintendent, or if known, said superintendent, cannot locate such owner, in each and every such instance said money shall escheat and vest in the state of Missouri, and it shall be the duty of said superintendent of insurance to pay the same to the state treasurer taking duplicate receipts therefor, one of which he shall file with the state auditor who shall charge the state treasurer therewith, and such money shall be credited to a fund to be designated as "escheat"; provided, however, that within five years after such money has been paid into the state treasury, any person or corporation who appears and claims the same may file his petition in the circuit court of Cole

county, Missouri, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the superintendent of insurance who shall file an answer to the same.

3. The court shall proceed to examine said claim and the allegations and proof, and if it find that such person is entitled to any money so paid into the state treasury, it shall order the state treasurer for the amount of said claim, but without interest or costs; a certified copy of which order shall be a sufficient voucher for issuing such warrant; provided further, that either party may appeal from the decision of said court in the same manner as provided by law in other civil actions; and provided further, that all moneys paid into the state treasury under the provisions of this section after remaining therein unclaimed for five years shall escheat and vest absolutely in the state and all persons or corporations shall be forever barred and precluded from setting up title or claim to any of said funds, and same shall be on the order of the board of funds commissioners transferred to the general revenue fund of the state; and provided further, that the provisions of this section shall apply to all funds now in the hands of the supt. of insurance or hereafter paid to him as a result of any rate litigation, whether same was accumulated in accordance with the provisions of sections 379.315 to 379.415 or otherwise. (L. 1941 p. 396 sec. 5985a)

APPENDIX "C"

Section 5678. Location of Office—Clerks—Legal Adviser

The said superintendent shall have his office in the City of Jefferson, and shall keep the same open for business from 8:00 a.m. to 5:00 p.m. every day except Sundays and public holidays. He shall have his office in the capitol and be provided with suitable rooms therein and be furnished with a suitable safe, furniture, stationery, printing and such other things as may be necessary for the trans-

action of the business of his office. He shall also have one clerk at a salary of one thousand five hundred dollars per annum and if it become necessary for a proper dispatch of the business of the department, said superintendent may employ additional clerical help at an expense not exceeding one thousand dollars per annum, and also to employ such actuarial work to be done as may be necessary, all of which expense shall be paid as provided for by section 5679 out of the amount appropriated by law from the fees collected by the insurance department. The attorney general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions. He may also employ suitable persons to make examinations as to the solvency of companies when he deems it necessary: provided, however, that he shall not employ any person in any capacity who is an officer, agent or employee of any insurance company or association. Said office shall be deemed a public office, and the records, books, and papers thereof, or on file therein, shall be deemed public records of the state. In the management of the assets of the dissolved companies, he shall employ only such clerical and other assistance as the courts having charge of the same may, in the first instance, direct.

APPENDIX "D"

SECTION 5874. ORDER OF SUPERINTENDENT SUBJECT TO REVIEW BY COURT—FUNDS TO BE DEPOSITED IN RESPONSIBLE BANKS

The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such orders or determinations are founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined *de novo*, but the burden of proof as to the unreasonableness or injustice of any order made by the superintendent of insurance shall rest upon the party or company, or companies, appealing from such order. The court shall have authority to sustain, set aside or

modify the orders and directions under review. During the pendency of such action or review, the orders and directions of the superintendent of insurance, as to reduction of rates, shall be suspended, but all such insurance companies shall, during the pendency of such action or review, deposit with the superintendent of insurance on all policies issued or renewed after the date of such order or direction, and until the final determination of such action, an amount equal to the difference between the rates fixed by the superintendent in his order and those in effect prior thereto, such funds to be held by the superintendent of insurance to await the result of such review, and in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata. The superintendent shall deposit all such funds so held by him in responsible banks and shall require good and sufficient bond for safekeeping and proper accounting: *Provided*, that said banks shall pay, for the benefit of such funds, not less than the lowest rate paid for state funds during such time, such interest to be computed on daily balances.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 427

JOHN T. BARKER,

Appellant,

vs.

C. LAWRENCE LEGGETT, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM

J. E. TAYLOR,
Attorney General of Missouri;
HARRY H. KAY,
Assistant Attorney General of Missouri,
Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

Civil No. 422

JOHN T. BARKER,

Plaintiff.

vs.

C. LAWRENCE LEGGETT, Superintendent of the Insurance Department of the State of Missouri; MOUNT ETNA MORRIS, Treasurer of the State of Missouri and as a Member of the Board of Fund Commissioners; W. H. HOLMES, Auditor of the State of Missouri and as a Member of the Board of Fund Commissioners of the State of Missouri; G. H. BATES, Director of Revenue of the State of Missouri and as Secretary of the Board of Fund Commissioners of the State of Missouri; FORREST SMITH, a Member of the Board of Fund Commissioners of the State of Missouri; and J. E. TAYLOR, a Member of the Board of Fund Commissioners of the State of Missouri,

Defendants

STATEMENT OF GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES OF THE APPEAL IN THIS CASE AND MOTION TO AFFIRM JUDGMENT.

Statement

Plaintiff-appellant was employed in 1930 by the Superintendent of the Insurance Department of the State of Missouri, with the approval of the then Governor and Attorney

General of Missouri, as Special Counsel for said Insurance Department. The terms of his contract provided that in the event he was successful in recovering all or any part of the undistributed residue of excess premiums collected by fire insurance companies in violation of the legal rates then in effect he should be paid from the recaptured funds a reasonable contingent fee. On three occasions, the Supreme Court of the State of Missouri construing the statutes of the State of Missouri controlling the employment and payment of plaintiff-appellant and others similarly employed, held that plaintiff-appellant could not under the statutes of Missouri be paid for his services out of the recaptured funds and that he had no lien against said funds.

In *Aetna Insurance Company* vs. *O'Malley*, 343 Mo. 1232, 124 S. W. 2d 1164, the Supreme Court of Missouri was ruling upon the allowance of a fee to plaintiff-appellant and other attorneys out of the recaptured funds. In ruling that case, the Supreme Court of Missouri concluded, 124 S. W. 2d, l. c. 1167:

> "It therefore, follows that the superintendent of insurance had a right to employ the respondents, but did not have the power to contract that their compensation should be paid out of this fund."

In the last mentioned decision the Supreme Court of Missouri further held that the principle which allows an attorney who has recovered a fund for a party an equitable lien against the fund had been superseded by the Insurance Code of Missouri, and further held that the only way plaintiff-appellant and other attorneys could be paid was by an appropriation of the Legislature.

In the later case of *State ex rel. Lucas* vs. *Blair*, 346 Mo. 1017, 144 S. W. 2d 106, the Supreme Court of Missouri again held that attorneys employed under the statutes of the State of Missouri, as plaintiff-appellant was employed,

could not be paid out of the recaptured funds and had no lien on said funds. Likewise, in the later cases of *Weatherby, Jacobs and Barker* vs. *Jackson, Superintendent*, 358 Mo. 542, 215 S. W. 2d 742, the Supreme Court of Missouri again held that plaintiff-appellant could not be paid out of the recaptured funds, had no lien upon said funds and could only be paid by an appropriation of the Legislature.

The present action by plaintiff-appellant seeks to have the court declare that he was entitled to be paid out of said recaptured funds and that he does have a lien against said funds. This case is in the Federal Court by reason of diversity of citizenship, the plaintiff-appellant being a resident of the District of Columbia, and the state officers, who are defendant-appellees, being residents of the State of Missouri. The Federal Court was bound by the ruling of the Supreme Court of Missouri as to the legality of the portion of plaintiff-appellant's contract providing for payment for his services. *Ruhlin* vs. *N. Y. L. Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860; *N. Y. L. Ins. Co.* vs. *Jackson*, 304 U. S. 261, 58 S. Ct. 871; *Guaranty Trust Co.* vs. *York*, 326 U. S. 99, 65 S. Ct. 1464. Plaintiff-appellant's contract was made pursuant to state statutes, and the construction of those statutes by the Supreme Court of Missouri is binding upon the Federal Courts.

Since plaintiff-appellant's contract with respect to his payment was illegal under the laws of the State of Missouri, there was no legal obligation under his contract and this case does not come within the purview of the Fourteenth Amendment to the Constitution of the United States. In Cooley's Constitutional Limitations, 8th Ed., Vol. 1, page 582, it is said:

> "'The obligation of a contract', it is said, 'consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming

> a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.' "

One of the tests that a contract has been impaired is that its value has by legislation been diminished. *Planters' Bank* vs. *Sharp*, 6 How. 301; *Home B. & L. Association* vs. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231.

Under the statutes of the State of Missouri as construed by the Supreme Court of that state, there was no obligation upon the part of anyone to pay plaintiff-appellant out of the recaptured funds, and hence, there was no obligation which the Escheat Act of 1941, Section 5985A Laws of Missouri 1941, page 397, now Section 379.395 R. S. Mo. 1949, could impair.

Since there was no obligation for payment to plaintiff-appellant out of the funds from which he now seeks payment, the Escheat Act of Missouri passed in 1941, Section 379.395 R. S. Mo. 1949, could not violate Article I, Sec. 10, par. 1, of the Constitution of the United States. For the same reason plaintiff-appellant had no property rights to be denied him so far as said recaptured funds are concerned. *Zane* vs. *Hamilton County*, 189 U. S. 370, 23 S. Ct. 538; *Griffith vs. Connecticut*, 218 U. S. 563, 31 S. Ct. 132; *Hunt vs. Hunt*, 131 U. S. 165. It is said in *Griffith* vs. *Connecticut*, *supra*, as follows:

> "* * * and as said by the court below, the contract clause of the Constitution of the United States 'does not give validity to contracts which are properly prohibited by statute.' "

The contention of plaintiff-appellant that he has been denied equal protection of the laws because the State of Missouri has not pursued actions against other attorneys who were *illegally* paid out of the recaptured funds is likewise not substantial. This, taken in its most favorable light

to plaintiff-appellant, is merely saying that because certain officers of the state countenanced illegal payments out of the funds to other attorneys they must now again countenance a further illegal payment to plaintiff-appellant. As pointed out by the District Court, the refusal now to permit further illegal payments to be made from the fund in question cannot be a denial of equal protection of the law to plaintiff-appellant. *Meyer* vs. *Terr. of Hawaii*, 164 F. 2d 845, 849.

It is respectfully submitted that there is no substantial claim of unconstitutionality of a state statute involved in this proceeding and no substantial claim of denial of any constitutional rights.

Motion to Affirm Judgment

Defendant-appellees move the court to affirm the judgment of the United States District Court for the Western District of Missouri, Central Division, rendered on September 5th, 1951, for the reason that it is manifest that questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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